90-384

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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

SUPERINTENDENT JOHN CURLEE, IN HIS OFFICIAL CAPACITY, and THE ABERDEEN SCHOOL DISTRICT,
Petitioners

v.

MARY ANN FYFE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the court of appeals place an undue burden on a Mississippi public school system by requiring it to justify, through direct proof, its decision to reassign the duties of a non-tenured school secretary, who failed to establish the deprivation element of her 42 U.S.C. § 1983 claim, and who established for the jury, through her own testimony, valid reasons for the transfer?

2. Did the court of appeals violate the mandate of the Seventh Amendment and invade the province of a federal court jury by vacating the jury's verdict in favor of the school system, and by concluding that the employee had established a constitutional violation as a matter of law?

PARTIES TO THE PROCEEDING

1. Superintendent John Curlee, in his official capacity, and the Aberdeen School District, Petitioners.

2. Members of the Board of Trustees of the Aberdeen School District, Petitioners:

   Hal C. Bourland, Jr.;*
   James W. Fitzpatrick;
   Russell Jackson;
   Patricia M. Ogden; and
   Faith Craig West.

3. Mary Ann Fyfe, Respondent.

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* Bragg Lampkin replaced school board member Hal C. Bourland, Jr., after the jury trial, but before the Court of Appeals' decision in this case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. THE COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF THIS COURT, AND IN CONFLICT WITH ESTABLISHED LAW	6
II. THE COURT OF APPEALS HAS RENDERED A DECISION WHICH CONFLICTS WITH THE ESTABLISHED RIGHT TO A JURY TRIAL IN AN ACTION FOR DAMAGES PURSUANT TO 42 U.S.C. § 1983, IN VIOLATION OF THE SEVENTH AMENDMENT	12
CONCLUSION	16
APPENDIX A:	
Opinion of the Court of Appeals	1a
APPENDIX B:	
Judgment and Mandate of the Court of Appeals	11a
APPENDIX C:	
Order Denying Motion for Preliminary Injunction and Cross-Motions for Summary Judgment	12a

TABLE OF CONTENTS—Continued

Page

APPENDIX D:

Transcription of Petitioners' Motion for Directed Verdict and District Court's Order Denying Petitioners' Motion for Directed Verdict 14a

APPENDIX E:

Jury Verdict 16a

APPENDIX F:

Judgment of the District Court 17a

APPENDIX G:

Order of the District Court Denying Motion for Judgment Notwithstanding Verdict or New Trial.. 18a

APPENDIX H:

Transcription from Jury Charge (pages 7-11 of the Supplemental Record) 19a

TABLE OF AUTHORITIES

Cases — Page

Augustine v. Doe, 740 F.2d 322 (5th Cir. 1984) 8
Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979) 9, 11, 12
Brantley v. Surles, 765 F.2d 478 (5th Cir. 1985) 14
Brown v. Bullard Indep. School Dist., 640 F.2d 651 (5th Cir. 1981) 13
Burris v. Willis Indep. School Dist., 713 F.2d 1087 (5th Cir. 1983) 9, 13
Burt v. Abel, 585 F.2d 613 (4th Cir. 1978) 13
Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) .... *passim*
Cook v. Hudson, 511 F.2d 744 (5th Cir. 1975), *cert. dismissed*, 429 U.S. 165, 97 S.Ct. 543, 50 L.Ed.2d 373 (1976) 7
Fyfe v. Curlee, 902 F.2d 401 (5th Cir. 1990) .... *passim*
Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979) 7
Gonzales v. Benavides, 774 F.2d 1295 (5th Cir. 1985), *cert. denied*, 475 U.S. 1140, 106 S.Ct. 1789, 90 L.Ed.2d 335 (1986) 11
Griffin v. Swim-Tech Corp., 722 F.2d 677 (11th Cir. 1984) 14
Hill v. McIntyre, 884 F.2d 271 (6th Cir. 1989) 13
Jett v. Dallas Indep. School Dist., 491 U.S. ——, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989) 13
Keyishian v. Bd. of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967) 7
Kirkland v. Northside Indep. School Dist., 890 F.2d 794 (5th Cir. 1989) 7, 10, 15
Matherne v. Wilson, 851 F.2d 752 (5th Cir. 1988) 10, 11
Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) 8, 10
Occidental Life Ins. Co. of California v. Bob LeRoy's, Inc., 413 F.2d 819 (5th Cir. 1969), *cert. denied*, 396 U.S. 939, 90 S.Ct. 373, 24 L.Ed.2d 241 14

TABLE OF AUTHORITIES—Continued

Page

Pickering v. Bd. of Educ., 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) ..... *passim*
Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315, *reh'g denied*, 483 U.S. 1056, 108 S.Ct. 31, 97 L.Ed.2d 819 (1987) 7, 15
Runyon v. McCrary, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) 1, 2, 7
Smith v. Hightower, 693 F.2d 359 (5th Cir. 1982) 8, 9, 11, 13
Stough v. Crenshaw County Bd. of Educ., 744 F.2d 1479 (11th Cir. 1984) 7
Sykes v. McDowell, 786 F.2d 1098 (11th Cir. 1986) 13, 15
Van Ooteghen v. Gray, 628 F.2d 488 (5th Cir. 1980) 13

Constitutional Provisions

U.S. Const. amend. I ..... *passim*
U.S. Const. amend. VII ..... *passim*
U.S. Const. amend. XIV 4, 5

Statutes

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 4
28 U.S.C. § 1343 4
42 U.S.C. § 1983 ..... *passim*
Miss. Code Ann. § 37-9-3 (Supp. 1989) 2, 9
Miss. Code Ann. § 37-9-59 (Supp. 1989) 2, 3

Court Rules

Sup. Ct. R. 13.1 1
Sup. Ct. R. 30.1 1

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OPINION BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 902 F.2d 401, and is included as Appendix A to this Petition.

JURISDICTION

The court of appeals entered its judgment on June 5, 1990. Pursuant to Sup. Ct. R. 13.1 and Sup. Ct. R. 30.1, this Petition for Writ of Certiorari is due to be filed on or before September 4, 1990.

Jurisdiction to review the decision of the court of appeals is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. I, as interpreted in *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415

(1976), to grant parents a First Amendment right to send their children to educational institutions of their choice, including those which "promote the belief that racial segregation is desirable. . . ." 427 U.S. at 176, 49 L.Ed.2d at 428.

U.S. Const. amend. VII, which mandates that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

42 U.S.C. § 1983, which provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Miss. Code Ann. § 37-9-3 (Supp. 1989), which provides as follows:

> Within the limits of the available funds, the superintendent of schools or administrative superintendent of a school district shall recommend to the school board thereof all non-instructional employees to be employed and may prescribe the duties thereof. Compensation for such employees may be paid from any lawful funds.

Miss. Code Ann. § 37-9-59 (Supp. 1989), which provides, in pertinent part, as follows:

> The school board of every district in this state is hereby prohibited from denying employment or re-employment to any person as a superintendent, principal or certificated employee, as defined in Sec-

tion 37-19-1, or as a non-instructional personnel, as defined in Section 37-9-1, for the single reason that any eligible child of such person does not attend the school system in which such superintendent, principal, certificated employee or non-instructional personnel is employed.

STATEMENT OF THE CASE

Respondent, a non-tenured at-will employee of the Aberdeen School District, was transferred from one clerical position to another clerical position within the school district. The school superintendent notified respondent that she would be transferred on the evening before teachers were to report to school for the beginning of the 1987-1988 academic year.

Respondent objected to the transfer, and characterized it as retaliatory action based upon her decision to withdraw her daughter from the public school system and enroll her in a private, segregated academy. She suffered no reduction in pay or loss of benefits, but she found the new job less enjoyable and less demanding than her previous position. She testified that she was not needed in her new position at an administrative facility, but acknowledged that during the year after her reassignment, four employees left their positions at the "Resource Center". The reassignment eventually resulted in respondent's designation as secretary of special education, but she remained unhappy with her new position.

The private school enrollment occurred in April of 1987. Also in April of 1987, after many months of meetings and negotiations, black parents and citizens' groups, including the NAACP, initiated a boycott of white-owned businesses in the City of Aberdeen. The boycott was based upon a number of demands being made by black citizens upon the Aberdeen School District, the student population of which is 74 per cent

black.[1] The conflict centered around such matters as the demand for employment of more black teachers and administrators, and the abandonment of the practice of ability grouping of students. Another concern expressed by the boycotters and citizens' groups was the employment within the school district of persons whose children attended segregated academies.

The boycott, which officially ended about a year after it began, was at its zenith during the summer of 1987. Parades, pickets and rallies became familiar sights in this small Mississippi community, which was struggling to maintain peace and order in the midst of racial strife. As petitioners prepared to open the schools in August of 1987, black leaders were threatening a boycott, or "walkout", of the Aberdeen public schools by black students.

Against this backdrop of racial dissension, which directly involved the public school system, and which threatened to impair not only the educational process, but also the safety and well-being of school children and personnel, petitioners opted to transfer respondent from her position as an elementary school secretary to a new position at the Resource Center. The transfer took place four months after the private school enrollment, and one week after respondent had reported for duty at the elementary school.

Respondent brought suit against the Aberdeen School District pursuant to 42 U.S.C. § 1983, alleging that the State of Mississippi, acting through its public school system in effecting the transfer, had violated rights secured to her by the First and Fourteenth Amendments. She asserted federal question jurisdiction under 28 U.S.C. § 1331, and further claimed federal jurisdiction based on 28 U.S.C. § 1343.

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[1] Since 1969, the Aberdeen School District has been operating under a federal court desegregation order, which requires annual statistical reports concerning the racial composition of both students and staff.

Both respondent and the school district filed motions for summary judgment. Respondent's motion was supported by her own affidavit, in which she set forth her retaliation claim, and stated that in her position as elementary school secretary, she had minimal contact with children. She further expressed her belief that her child's enrollment at a different school would have no effect on any legitimate school function. In support of its own motion for summary judgment, the school district offered seven affidavits from school board members, administrators and teachers, as well as the chief of police. These affidavits depicted the volatile racial situation which existed in both the City of Aberdeen and its public schools in August of 1987. The affidavits further documented the belief, on the part of the school district, that respondent's continued presence at the elementary school would not only disrupt the educational process, but might result in physical harm to respondent, her child or others.

Both summary judgment motions were denied by the district court. App. C. The superintendent was dismissed from the suit in his individual capacity, and the case proceeded to trial before a jury. At the close of respondent's case, the school district made a motion for directed verdict on grounds that respondent had failed to establish any First or Fourteenth Amendment deprivation, or any policy whatsoever concerning hiring practices in the school district. Further, the school district's motion for directed verdict was based on its contention that respondent herself had established a justification for the district's decision to move her to a different and less visible position in the school system. App. D at 14a.

The district court denied the school district's motion for directed verdict. App. D at 15a. The school district then elected to rest without offering any evidence in its own behalf.

The jury returned a general verdict for the Aberdeen School District; and from that verdict, respondent ap-

pealed. In vacating the jury's verdict and ruling that respondent had established a constitutional violation as a matter of law, the court of appeals condemned the school district's failure to offer evidence that respondent's enrollment of her daughter in the private school substantially interfered with the effectiveness of the school system.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF THIS COURT, AND IN CONFLICT WITH ESTABLISHED LAW

In *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), this Court held that a district court had imposed an unduly onerous burden on the State of Texas, in defending a 42 U.S.C. § 1983 case, by requiring the state to demonstrate clearly that the conduct of an assistant district attorney had substantially interfered with operations of the prosecutor's office. Being dissatisfied with her transfer from one section of criminal court to another, and being loath to accept the transfer, the assistant proceeded to circulate a questionnaire among her co-workers. She was subsequently terminated from her employment for refusal to accept the reassignment of duties, and informed that her distribution of the questionnaire was considered as an act of insubordination.

In reversing a decision in favor of the employee, the Court held that the district court in *Connick*, and the court of appeals as well, had misapplied the Court's decision in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and had consequently "erred in striking the balance" for the employee. *Connick*, 461 U.S. at 142, 75 L.Ed.2d at 717. That error has been made again in this case.

The *Pickering* balancing, which was misapplied in *Connick*, refers to the process which must be utilized

whenever the rights of a public employee, as a citizen, conflict with the interest of a state, as an employer, in promoting the efficiency of the public services it performs through its employees. 391 U.S. at 568, 20 L.Ed.2d at 811. Petitioners can cite no case, however, where the *Pickering* "balancing" was required to be implemented, solely on the basis of an unsupported claim of a First Amendment deprivation.

Petitioners here do not challenge the right of respondent to send her child to a private, segregated academy.[2] Nor do they seek to condition public school employment upon the abandonment of that right, although that issue was presented to this Court in *Cook v. Hudson*, 511 F.2d 744 (5th Cir. 1975), *cert. dismissed*, 429 U.S. 165, 97 S.Ct. 543, 50 L.Ed.2d 373 (1976). Respondent's rights in both regards are well-founded in the law. *See Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *Pickering*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811.

The Aberdeen School District does, however, challenge the court of appeals' interpretation and misapplication of *Pickering* in this case. In both *Pickering* and *Connick*, and in countless other reported cases involving the juxtaposition of a public employee's First Amendment freedoms against a state's legitimate interest in promoting the efficiency of the public services it provides,[3] the employee in each instance was terminated, or otherwise sub-

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[2] The parties to this action stipulated, in the pretrial order, that Oak Hill Academy is a segregated (all-white) private school.

[3] *See, e.g., Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979); *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315, *reh'g denied*, 483 U.S. 1056, 108 S.Ct. 31, 97 L.Ed.2d 819 (1987); *Kirkland v. Northside Indep. School Dist.*, 890 F.2d 794 (5th Cir. 1989); *Stough v. Crenshaw County Bd. of Educ.*, 744 F.2d 1479 (11th Cir. 1984).

jected to undeniably adverse personnel action as a result of the protected activity. The courts were then called upon to determine whether the employee's conduct was protected, and whether the conduct was a motivating factor in the adverse personnel action. Assuming that the employee can establish that the conduct was protected, and that it was a motivating factor in the termination, then the state may be required to show that it would have reached the same decision even in the absence of the protected conduct. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

The problem with the *Mt. Healthy* analysis and the balancing of interests required by *Pickering* and its progeny, is that in each of those cases, the deprivation was the given point of beginning, from which the courts proceeded to determine whether the activity engaged in by the employee was constitutionally protected. In this case, however, the issue was not whether respondent had the right to send her child to private school. That right was acknowledged, and it remained intact. The child went to Oak Hill Academy, while respondent continued to work for the school system. In this case, the threshold issue, which Mary Ann Fyfe was unable to establish, was the deprivation of a constitutional right.

There are two essential elements to any action brought pursuant to 42 U.S.C. § 1983. *Augustine v. Doe*, 740 F.2d 322, 324-325 (5th Cir. 1984). First, the conduct complained of must have been committed by a person acting under color of state law. The school district does not dispute its identity as a functionary of the State of Mississippi. It was respondent's failure to prove the second essential element of a § 1983 action which was fatal to her case: the transfer must have deprived her of rights, privileges, or immunities secured by the Constitution or laws of the United States.

The Fifth Circuit noted in *Smith v. Hightower*, 693 F.2d 359 (5th Cir. 1982), that "[t]he first inquiry in

any § 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.' If there has been no such deprivation, the state of mind of the defendant is wholly immaterial." 693 F.2d at 368 n. 20 (quoting *Baker v. McCollan*, 443 U.S. 137, 140, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433, 439 (1979)).

Respondent's proof was insufficient to support her claim of a constitutional deprivation; and therefore, under *Smith* and *Baker*, the school district's reasons for the transfer were immaterial; and the district had no burden to justify its reasons for the transfer. Respondent was not terminated; nor did she suffer any reduction in wages or benefits. The assignment of her duties was within the discretion of the superintendent, under the authority of Miss. Code Ann. § 37-9-3 (Supp. 1989). Respondent received the same pay increases as did other non-instructional employees. By her own testimony she lost nothing but the privilege of working in a position which she preferred and considered to be more rewarding. The only damages she claimed were discontentment with her duty assignment, hurt pride, and a sense of damaged reputation in the community. Those factors alone do not represent constitutionally protected interests. *See, e.g., Burris v. Willis Indep. School Dist.*, 713 F.2d 1087, 1091 (5th Cir. 1983). And so respondent's deprivation claim must fail, unless this Court chooses to extend constitutionally protected status to the preference of a non-tenured, non-certificated employee of the public school system for one clerical position over another clerical position of equal pay and equal benefits.

Respondent also failed to substantiate her claim that the transfer represented retaliatory action by the school district, in response to her decision to enroll her child in private school. Although she testified about a "known" school district policy disfavoring employees who send their children to private school, she never offered inde-

pendent proof as to the existence of any employment policy whatsoever. Respondent in fact disproved her claim concerning school policy by naming three school system employees whose children attended the private school. Her mere disagreement with the superintendent regarding the assignment of her duties was a purely private matter; and as a non-tenured employee respondent enjoyed no First Amendment protection in that regard. *See Kirkland*, 890 F.2d at 799.

The jury heard the testimony of respondent and her witnesses, and without hearing any direct evidence from the school district, returned a verdict in its favor. In spite of the jury verdict, the court of appeals held that "[b]ecause the school district produced no evidence of substantial interference with its effectiveness as a result of Mrs. Fyfe's enrollment of her daughter in private school, Mrs. Fyfe must prevail as a matter of law." *Fyfe*, App. A at 8a. This ruling of the appeals court is a departure from established law. The Fifth Circuit, in its decision, has expanded *Pickering*, *Mt. Healthy* and *Connick* beyond their holdings, to require a public school, and presumably any public employer, to justify by affirmative proof any administrative decision which an employee might dislike, merely by characterizing it as a violation of a First Amendment freedom.

This court of appeals-created burden is identical to that which was condemned in *Connick*, to the end that requiring the state to justify a prosecutor's discharge imposed an unduly onerous burden under the circumstances of that case. Quoting from *Pickering*, the court in *Connick* noted "that the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression. Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests". *Connick*, 461 U.S. at 150, 75 L.Ed.2d at 722.

In *Matherne v. Wilson*, 851 F.2d 752 (5th Cir. 1988), the Fifth Circuit noted that "[o]ccasionally, the state's

burden to justify its actions may be as light as merely proving that the employer reasonably believed the employee's speech was likely to disrupt its operations." 851 F.2d at 761 n. 53, quoting *Gonzalez v. Benavides*, 774 F.2d 1295 (5th Cir. 1985), *cert. denied*, 475 U.S. 1140, 106 S.Ct. 1789, 90 L.Ed.2d 335 (1986).

The school district has maintained throughout these proceedings that because respondent failed to establish a deprivation of any constitutional or federal right, it had no burden to justify its decision to transfer her. That contention is supported by *Smith v. Hightower*, 693 F.2d at 368 n. 20, citing this Court's decision in *Baker*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433. If this Court should determine, however, as did the court of appeals, that respondent "established a constitutional violation as a matter of law" (*Fyfe*, App. A at 10a), then the school district submits that its burden was minimal, and that respondent, on cross-examination, told the jury all it needed to know in order to find, by a preponderance of the evidence, that the school district's reasons for effecting the transfer outweighed any interest of respondent, as a non-tenured employee, in controlling the particular terms of her employment.

If the opinion of the appeals court is allowed to stand, the impact of that decision will be to place an "unduly onerous burden," in the words of *Connick*, 461 U.S. at 149, 150, 75 L.Ed.2d at 722, upon public schools and public employers everywhere, by undermining their decision-making authority, and placing tremendous legal and financial burdens on those employers whenever a disgruntled employee couches even an unsubstantiated grievance, on a matter of only private concern, in terms of a First Amendment deprivation.

The court of appeals vacated the judgment of the district court in favor of the school district, because the school district failed to put on affirmative proof that "its action in reassigning Mrs. Fyfe was necessary to the

smooth and efficient operation of the school system . . .", and because "[n]o causal link was ever made between the threatened school boycott and Mrs. Fyfe's action." *Fyfe*, App. A at 8a.

In *Connick*, however, this Court ruled that it is not necessary for "an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." 461 U.S. at 152, 75 L.Ed.2d at 723. Under the law of *Connick*, a school district in a community torn by racial strife was not required to wait for violence to erupt before it could move a non-tenured employee from one position to another. Furthermore, the "causal link" which might have been required under any balancing of interests was supplied by respondent herself during the presentation of her case.

By requiring the Aberdeen School District to justify, by affirmative evidence, its reasons for effecting the lateral transfer of a non-tenured clerical employee, who had failed to establish any constitutional deprivation as a result of that action, the court of appeals held the school district to an undue burden, and rendered a decision in conflict with this Court's decisions in *Connick* and *Baker*.

II. THE COURT OF APPEALS HAS RENDERED A DECISION WHICH CONFLICTS WITH THE ESTABLISHED RIGHT TO A JURY TRIAL IN AN ACTION FOR DAMAGES PURSUANT TO 42 U.S.C. § 1983, IN VIOLATION OF THE SEVENTH AMENDMENT

In its opinion below, the court of appeals vacated the jury's verdict in favor of the school district and decided, as a matter of law, a factual issue which was within the province of the jury. It did so by concluding that respondent had "established a constitutional deprivation as a matter of law" (App. A at 10a), without deference to the "clearly erroneous" standard, which properly confines

appellate review to situations where "the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed." *Smith v. Hightower*, 693 F.2d 359, 370 (5th Cir. 1982) (citation omitted) (emphasis added). If the appeals court had objectively reviewed the entire record, it would have struck the balance in this case in favor of the school district, just as the jury did.

In § 1983 cases which arise in the context of public employment, the question whether specific speech or conduct is protected, and the balancing of interests required by *Pickering*, have been interpreted by this Court and others to be matters of law. *See Connick*, 461 U.S. at 148 n. 7, 75 L.Ed.2d 720 n. 7; *Van Ooteghen v. Gray*, 628 F.2d 488, 492 (5th Cir. 1980). Even so, an appellate court is constrained to follow the trial court's findings, absent clear error, because "it is the function of the jury as the traditional finder of facts, and not the Court, to weigh conflicting evidence and influences, and determine the credibility of witnesses." *Burris v. Willis Ind. School Dist.*, 713 F.2d 1087, 1089 (5th Cir. 1983). Certainly there are some factual issues in § 1983 cases which remain solely within the province of the jury.[4]

The Seventh Amendment has been interpreted to afford the right to trial by jury in § 1983 suits for damages. *Burt v. Abel*, 585 F.2d 613 (4th Cir. 1978). That right is nullified, however, when an appeals court is allowed to vacate a jury verdict whenever it utilizes the phrase "ultimate fact", or characterizes a paramount factual issue "as a matter of law," in order to justify plenary review of a case. *See, e.g., Van Ooteghen*, at 628 F.2d at 491, 492 (5th Cir. 1980).

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[4] *See, e.g., Jett v. Dallas Indep. School Dist.*, 491 U.S. ——, 109 S.Ct. 2702, 105 L.Ed.2d 598, 628 (1989); *Sykes v. McDowell*, 786 F.2d 1098, 1105 (11th Cir. 1986); *Brown v. Bullard Indep. School Dist.*, 640 F.2d 651, 654 (5th Cir. 1981); *Hill v. McIntyre*, 884 F.2d 271, 275 (6th Cir. 1989).

Connick does not grant to an appeals court a license to ignore a jury verdict. Such action may be taken only in extraordinary cases involving an abuse of discretion by the trial court in ratifying a jury verdict. *See, e.g., Griffin v. Swim-Tech Corp.*, 722 F.2d 677 (11th Cir. 1984).

The jury in this case was properly instructed (App. H), and there was substantial evidence to support the verdict against respondent, and in favor of the school district. The court of appeals chose to ignore that evidence, however, since it was not offered affirmatively by the school district, but rather was adduced on cross-examination during the presentation of respondent's case.

There is no legal basis for the appeals court's decision that petitioners were required to offer direct proof in order to substantiate a verdict in their favor. The Fifth Circuit's reliance on *Brantley v. Surles*, 765 F.2d 478 (5th Cir. 1985), as requiring independent proof of the school district's reasons for the transfer, where the respondent had failed to meet her own initial burden of establishing any deprivation, was error. In *Connick*, a similar requirement was held to have imposed an unduly onerous burden on the state.

Juries are permitted, "even if nothing else supports their conclusion, to make negative inferences . . . and to draw inferences from evidence, even when it is undisputed." *Occidental Life Ins. Co. of California v. Bob LeRoy's, Inc.*, 413 F.2d 819, 822 (5th Cir. 1969), *cert. denied*, 396 U.S. 939, 90 S.Ct. 373, 24 L.Ed.2d 241. Here the evidence in support of respondent's retaliation claim was not undisputed, in spite of the Fifth Circuit's finding to the contrary. Rather respondent defeated her own § 1983 claim, by admitting that she had not been damaged in any measurable way as a result of her transfer, and by failing to prove any unconstitutional policy on the part of the school district. She actually disproved the existence of a policy disfavoring employees whose

children attend segregated academies by naming several employees whose children attended Oak Hill.

The jury was also able to find, on the basis of the evidence, that the school district's interest in opening its schools in August of 1987, with a minimum of disruption, under extremely difficult circumstances, outweighed the desire of a non-tenured clerical employee to control the terms of her employment within the school system. The Fifth Circuit itself has noted that "[f]ederal courts should focus upon the manner, time and place of an employee's expression, as well as the context in which it arose." *Kirkland v. Northside Indep. School Dist.*, 890 F.2d 794, 799 (5th Cir. 1989), (quoting *Rankin*, 483 U.S. at 388, 79 L.Ed.2d at 327).

On cross-examination, respondent admitted that the long-threatened economic boycott had actually begun, and that the threatened school boycott had the potential to devastate the school system. She described pickets, marches and rallies, and admitted seeing the boycotters about town every day and every weekend for months. She admitted that there was extensive state-wide media coverage, depicting the saga of the boycott in Aberdeen. She also acknowledged that she was aware of the demands being made upon the school district by the NAACP and others, including their specific concern regarding the school district's employment of persons whose children attend segregated academies. On the basis of Mary Ann Fyfe's testimony alone, the jury was justified in returning a verdict for the school district.

If there were error committed by the trial court, in allowing the jury to do the balancing of interests required by *Pickering*, then that error inured to the benefit of respondent, who might have won a jury trial on issues which never should have been submitted to the jury.[5] By entering judgment in accordance with the jury's verdict,

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[5] *See, e.g., Sykes v. McDowell*, 786 F.2d 1098 (11th Cir. 1988).

and denying respondent's motions for judgment n.o.v. and new trial (App. G), the district court ratified and adopted as its own findings what the jury must have determined, namely, that respondent suffered no harm, and that what the school did in transferring her was a reasonable exercise of its authority and its obligation to operate its public schools in a safe and educationally sound manner, under adverse circumstances.

To allow the court of appeals to vacate a jury verdict supported by the evidence, and rendered pursuant to proper instructions (App. H), is to deny the right to a jury trial in § 1983 cases which arise in the context of public schools, or to condition that right upon the unfettered discretion of appeals courts to make factual determinations "as a matter of law." *Fyfe*, App. A at 10a.

The "independent constitutional judgment on the facts" [6] permitted by *Connick* should not be interpreted or expanded to allow appeals courts to deny § 1983 litigants the right to a jury trial, in violation of the Seventh Amendment.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the writ of certiorari issue.

Respectfully submitted,

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[6] 461 U.S. 150 n. 10, 75 L.Ed.2d 722 n. 10.

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 89-4344

MARY ANN FYFE,
Plaintiff-Appellant,
v.

JOHN CURLEE, in his Official Capacity, and the
ABERDEEN MUNICIPAL SEPARATE SCHOOL DISTRICT,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi

June 5, 1990

Before BROWN, JOLLY and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge.

Plaintiff, Mary Anne Fyfe, appeals a take nothing judgment rejecting relief to her on her 42 U.S.C. § 1983 action. Plaintiff claimed that her employer, the Aberdeen Municipal Separate School District, and its superintendent John Curlee, retaliated against her for exercising her right to enroll her daughter Shannon in private school. We vacate the judgment of the district court and remand the case for trial on the appropriate remedy to which Mrs. Fyfe is entitled.

I.

The plaintiff, Mary Anne Fyfe, was employed for four years as a secretary to the Vine Street Elementary School District in Aberdeen, Mississippi. In April 1987, the plaintiff and her husband, Ruffin Fyfe, removed their daughter Shannon from the Aberdeen public schools and enrolled her in Oak Hill Academy, an all-white private school in West Point, Mississippi. The Fyfes were concerned that Shannon had experienced difficulty getting along with another white child in the public school for years and felt she would be happier at Oak Hill.

Around April 1987 a number of local black citizens and community leaders began boycotting Aberdeen businesses; the boycott continued during the summer and fall of 1987. The boycott was intended primarily to put pressure on the school system to increase the number of black teachers and administrators.

In June of 1987, School Superintendent John Curlee met with Mrs. Fyfe about Shannon's enrollment at Oak Hill Academy, and told Mrs. Fyfe that he "would prefer" that she work some place else. Mr. Curlee again met with Mrs. Fyfe in August of 1987, and told her he would "appreciate it" if she would find a job elsewhere. Mrs. Fyfe told him the law stated she did not have to resign, and that she would not do so. Superintendent Curlee then transferred Mrs. Fyfe to a newly created job at the Resource Center.

Mrs. Fyfe considered her new job undesirable and she filed suit under 42 U.S.C. § 1983 in federal district court in September 1987; she alleged that the retaliatory job transfer violated rights secured to her under the First and Fourteenth Amendments. She sought reinstatement to her former position, nominal damages, damages for mental stress and anxiety, and attorneys' fees.

The case was tried in April 1989. At trial the plaintiff testified to the requests of the superintendent that she

find work elsewhere, to her transfer, and to the menial nature of her new position. She also testified to knowing about the boycott, but stated that she had never received any threats or complaints from blacks concerning her decision; some blacks had "actually supported" her. The school district, in support of pretrial motions, had asserted through affidavits that the school was threatened with adverse effects from Mrs. Fyfe's action, including violence. But at trial, the school district adduced no evidence and rested after the plaintiff completed her case. The court denied plaintiff's motion for directed verdict, and the jury returned a general verdict in favor of the school district. Plaintiff appeals. After the jury verdict Mrs. Fyfe resigned her position with the school district.

Mrs. Fyfe argues on appeal that her unrebutted evidence established as a matter of law that the school district violated her constitutional rights.

II.

To state a claim upon which relief can be granted under 42 U.S.C. § 1983, the plaintiff must allege that the defendant acted under color of state law to deprive her of a right, privilege, or immunity guaranteed by either the Constitution or laws of the United States. *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980); *Brantley v. Surles*, 718 F.2d 1354, 1357-58 (5th Cir.1983).

The plaintiff has the initial burden of establishing that her conduct was constitutionally protected, and that this conduct was a "substantial" or "motivating" factor in the decision to transfer her to a new position. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); *Kirkland v. Northside Indep. School District*, 890 F.2d 794, 799 (5th Cir.1989); *Burris v. Willis Independent School District*, 713 F.2d 1087, 1093 (5th Cir.1983). The question whether specific conduct or speech is protected by the First Amendment is ultimately a question

of law. *Brantley*, 718 F.2d at 1359 n. 6; *Burris*, 713 F.2d at 1094.

We have no doubt that conduct such as Mrs. Fyfe's in transferring her daughter to private school enjoys constitutional protection. In *Brantley v. Surles*, 718 F.2d 1354 (5th Cir.1983), a public school cafeteria worker was discharged, allegedly because her son attended a private academy rather than the local public school. *Brantley* reinforced the Supreme Court's long-standing recognition that the Constitution protects familial relationships and practices, and that "[t]he parental interest in the direction and control of a child's education is central to the family's constitutionally protected privacy rights." *Brantley*, 718 F.2d at 1358, *citing Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). Mrs. Fyfe's decision to send her child to a private school was protected under the First Amendment and the penumbra of familial privacy rights recognized by the Supreme Court.

Mrs. Fyfe was also required to establish that her protected conduct was a substantial or motivating factor in the decision to transfer her. The defendant stipulated that Mrs. Fyfe's "decision to send her child to Oak Hill Academy was a significant and precipitating factor in its decision to transfer the plaintiff to another position." The school district did not present any other reason for the transfer.

The only remaining question is whether Mrs. Fyfe's transfer to a less responsible, more menial job at the same wage amounted to a constitutional deprivation.

Mrs. Fyfe was a non-tenured, non-instructional employee-at-will, and had no property interest or claim of entitlement to employment in the school system, or to her job at Vine Street Elementary School. Even though Mrs. Fyfe was an employee-at-will, the school district clearly could not discharge Mrs. Fyfe for exercising her con-

stitutional right to control her child's education, unless it could demonstrate that the conduct materially and substantially interfered with the effectiveness of the school system. We stated in *Brantley:* "Although public school authorities may discharge an employee unprotected by a reasonable expectation of continued employment for any job-related reason or for no reason at all, *see Thompson v. Madison County Board of Education*, 476 F.2d 676 (5th Cir.1973), it is well established that they may not do so for a reason which infringes 'constitutionally protected interests.' *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972)." *Brantley*, 718 F.2d at 1358.

Nor could Mrs. Fyfe be threatened with discharge for putting her child in private school, even if she was never actually fired. The Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563, 574, 88 S.Ct. 1731, 1737, 20 L.Ed.2d 811 (1968), stated that a threat of discharge can be a potent means of chilling the exercise of Constitutional rights. Mrs. Fyfe testified that she was told by Superintendent Curlee that if she did not accept the transfer to the Resource Center "there would be no place for [her] in the public school system."

In *Reeves v. Claiborne County Board of Education*, 828 F.2d 1096 (5th Cir.1987), we held that the reassignment of a school administrator to a newly-created less desirable position within the school system to retaliate against her for testifying in a co-employee's lawsuit against her employer violated her First Amendment rights. The new position included no supervisory authority over other employees, and the district court found that "certain longtime perquisites were withdrawn from Reeves, such as reimbursement for attendance at statewide school meetings and the overlooking of her shortened daily work schedule." *Id.* at 1098-99. We accepted the district court's finding that the Superintendent's action "recommending a mid-year transfer of Mrs. Reeves

into a wholly unsuitable office space (the home economics kitchen) with no job description or administrative cooperation was 'an improper and retaliatory response to her testimony' ". *Id.* at 1102. Reeves' salary was not reduced during the balance of the year following her transfer, but she signed a new contract for a lower salary the following year. We held in *Reeves* that "[t]o allow a government employer to retaliate via demotion, transfer or reassignment against an employee's unfavorable trial testimony would undermine the ability of the witness to speak truthfully without fear or reprisal." *Id.* at 1100.

This court also stated in *Bickel v. Burkhart*, 632 F.2d 1251 (5th Cir.1980), "[w]here, as here, important conditions of employment are involved, a public employee will not be foreclosed from § 1983 relief merely because the impermissible retaliation did not result in the termination of his employment." *Id.* at 1255 n. 6. In *Bickel* we held that a promotion constituted an important condition of employment, so that a fireman was entitled to back pay and retroactive seniority where he established that he was not promoted because he voiced criticisms at a meeting. We also reversed and remanded a district court finding of no constitutional deprivation, where a teacher received a public reprimand and a reprimand letter in his file for a press release issued concerning the professional conduct of an unnamed principal. *Swilley v. Alexander*, 629 F.2d 1018 (5th Cir.1980). We noted in *Swilley* that "[a]lthough Swilley's employment was not terminated, it is quite possible for his property interests to have been affected by both the public reprimand and the reprimand letter." *Id.* at 1021 n. 4.

Mrs. Fyfe was transferred by the Superintendent from her job as secretary to an elementary school principal; Mrs. Fyfe and her principal testified her job gave her substantial authority and was both "demanding, and enjoyable. She was transferred to a newly-created job at

the Resource Center where for half a year her only duties were xeroxing and laminating documents, and for the remainder of the year she primarily helped another secretary combine file folders. Mrs. Fyfe testified that the other secretary easily could have done this task alone. Mrs. Fyfe had no job description and no duties save the menial tasks described above. According to Mrs. Fyfe, when Mr. Curlee notified her of her transfer she knew "there was not a job available at the Resource Center. I asked [Mr. Curlee] if he had created a job? He said, yes. I asked him if he wanted me out of the school system. He said yes. I told him there was no job available at the Resource Center, and he said, yes." Mrs. Fyfe testified that she was not permitted to go into the schools, and her coworkers were forbidden to take breaks with her. We conclude that the uncontradicted evidence reveals that the school district violated rights secured to Mrs. Fyfe under the First and Fourteenth Amendments when it transferred her from a productive, satisfying position to a menial make-work one.

The only question that remains is whether the record supports the view that Mrs. Fyfe's protected conduct of enrolling her child in a private school was detrimental to the efficient operation of the appellee's school system. *See Pickering*, 391 U.S. at 568-570, 88 S.Ct. at 1734-1735. We stated in *Brantley* that "In the realm of public school employment, the court must balance the interests of the school employee with the interest of the state in promoting efficiency in the educational services which it provides through its school employees." *Brantley*, 718 F.2d at 1359, citing *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). The state may legitimately interfere with the constitutionally protected conduct of a public school employee only when that conduct materially and substantially impedes the operation or effectiveness of the educational program. *See Tinker v. Des Moines Independent Community School*

District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

This balancing is to be conducted by the court as a matter of law, not fact. *See Connick v. Myers*, 461 U.S. 138, at 148 n.7, 150 n.10, 103 S.Ct. 1684, 1690 n.7, 1692 n.10, 75 L.Ed.2d 708 (1983) (the court "cannot 'avoid making an independent constitutional judgment on the facts of the case.' "); *Nieto v. San Perlita Indep. School District*, 894 F.2d 174, 179 (5th Cir.1990).

Because the school district produced no evidence of substantial interference with its effectiveness as a result of Mrs. Fyfe's enrollment of her daughter in private school, Mrs. Fyfe must prevail as a matter of law. The record is completely silent on any effect Shannon Fyfe's move to the private school had on the appellee school district. This court held in the second appeal in *Brantley* that belief alone of such interference "unsupported by any objective evidence" is not sufficient to demonstrate material interference to carry the balancing test for the school district. *Brantley v. Surles*, 765 F.2d 478, 480 (5th Cir.1985).

No causal link was ever made in the district court between the threatened school boycott and Mrs. Fyfe's action. When asked on cross-examination whether she was aware that one of the demands of the boycotting group was "that the school system not employ anybody who does now or ever has had a child in a private segregated academy," the plaintiff responded that she had read about that in the paper. The mere fact that this demand was made on the school system however cannot be sufficient to demonstrate that Mrs. Fyfe's enrollment of her daughter at a private school caused substantial and material interference with the school system's operation and effectiveness. The Supreme Court stated in *Tinker* that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome" the exercise of First Amendment rights. 393 U.S. at

508, 89 S.Ct. at 737. There was no evidence of complaints by the boycotting blacks to the school district concerning Mrs. Fyfe's action, or even when the school boycott was threatened in relation to Shannon Fyfe's transfer.

Thus the defendant has failed to demonstrate that its action in reassigning Mrs. Fyfe was necessary to the smooth and efficient operation of the school system, and Mrs. Fyfe must prevail as a matter of law.

III.

The only remaining issue concerns the appropriate remedy in this case.

Because we find a violation of plaintiff's constitutional rights, Mrs. Fyfe is at minimum entitled to nominal damages of $1. *See Memphis Community School District v. Stachura*, 477 U.S. 299, 308 n. 11, 106 S.Ct. 2537, 2543 n. 11, 91 L.Ed.2d 249 (1986); *Carey v. Piphus*, 435 U.S. 247, 266, 98 S.Ct. 1042, 1053, 55 L.Ed. 2d 252 (1978); *Familias Unidas v. Briscoe*, 619 F.2d 391, 402 (1980).

Mrs. Fyfe initially sought reinstatement to her former position, nominal damages, damages for mental stress and anxiety, and attorneys' fees. When this case was tried, Mrs. Fyfe was still working in the job she considered undersirable, and she asserted no claim predicated on constructive discharge. Mrs. Fyfe then resigned her position after judgment was rendered against her in the district court. Plaintiff's counsel at oral argument asserted that he will seek reinstatement of Mrs. Fyfe to her former position, and damages for mental stress and anxiety and constructive discharge if the case is remanded to the district court.

We remand this case to the district court for a trial on the appropriate remedy to which Mrs. Fyfe is entitled. Nominal damages of $1 will be awarded. Mrs.

Fyfe is entitled to pursue her case in the district court for reinstatement to her original position, damages for mental anguish and for constructive discharge. Because she is the prevailing party, the district court must also consider her claim for attorney's fees under 42 U.S.C. § 1988.

The judgment of the district court is vacated because we conclude that Mrs. Fyfe established a constitutional violation as a matter of law. We remand for trial on the appropriate remedy available to Mrs. Fyfe consistent with this opinion.

REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-4344

D.C. Docket No. EC 87 262 B G

MARY ANN FYFE,
Plaintiff-Appellant,
versus

JOHN CURLEE, in his Official Capacity, and
THE ABERDEEN MUNICIPAL SEPARATE SCHOOL DISTRICT,
Defendants-Appellees.

Appeal from the United States District Court of the Northern District of Mississippi

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Before BROWN, JOLLY and DAVIS, Circuit Judges.

JUDGMENT

June 5, 1990

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is vacated, and the cause is remanded to the District Court for trial on the appropriate remedy available to Mrs. Fyfe in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that costs on appeal be taxed against the Aberdeen Municipal Separate School District.

Issued as Mandate: Jun. 27, 1990

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

No. EC87-262-B-D

MARY ANNE FYFE

v.

JOHN CURLEE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, and THE ABERDEEN MUNICIPAL SEPARATE SCHOOL DISTRICT

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION AND CROSS-MOTIONS FOR SUMMARY JUDGMENT

[Filed Aug. 1, 1988]

This cause comes before the court on the plaintiff's motion for preliminary injunction and the parties' cross-motions for summary judgment. The plaintiff moves for a preliminary injunction on the ground that a monetary remedy would be inadequate. The plaintiff's memorandum does not address the four prerequisites for preliminary injunction. *See Jackson v. Stinchcomb*, 635 F.2d 462, 466 (5th Cir. 1981). The court finds that the plaintiff has failed to show a substantial threat of irreparable injury at this point. Therefore, the motion for preliminary injunction is not well taken and will be denied.

Upon due consideration of the parties' memoranda in support of the cross-motions for summary judgment, the

court finds that there are genuine issues of material fact, including but not limited to whether the enrollment of the plaintiff's child in a private, segregated school was the sole reason for the plaintiff's transfer, whether the private school enrollment would have materially and substantially interfered with the operation of the public school system if the plaintiff had remained in her secretarial position, and the current racial conditions. Therefore, the cross-motions for summary judgment are not well taken and will be denied. It is

ORDERED:

That the plaintiff's motion for preliminary injunction be and is hereby Denied; and

That the parties' cross-motions for summary judgment be and are hereby Denied.

This, the 29th day of July, 1988.

/s/ Neal Biggers
United States District Judge

APPENDIX D

EXCERPTS FROM TRANSCRIPT OF PETITIONERS' MOTION FOR DIRECTED VERDICT

• • • •

[65] THE COURT: Go ahead and make it.

MR. MILLS: Comes now the Defendant, Aberdeen School Board and Defendant John Curlee, by and through their counsel, and move this court for a directed verdict in favor of the Defendants.

In support therein, the Defendants would show that the Plaintiffs have failed to establish a property interest in the job position held by the Plaintiff, entitling the Plaintiff to any Fourteenth Amendment rights, and further the Plaintiffs have failed to put on any proof that there First Amendment rights of association have been effected by any means whatsoever, but, in fact, the Plaintiff's child is still enrolled in the private school she was attending.

The Defendants would further show that no proof has been introduced as to any policy by the Aberdeen School District or any of its administrators regarding the hiring of employees.

Further, proof has been brought out on cross-examination that, in fact, at the time of the unconstitutional transfer, as alleged by the Plaintiff, a boycott was in full force and effect in the City of Aberdeen, and that that boycott was something the School Board and the Superintendent could have and should have considered in making their decision to transfer the Plaintiff to her position.

Further, the Plaintiff has put on no proof [66] whatsoever of any losses of any monetary value of any nature, and, therefore, has failed to meet her burden, and we would move at this time for a directed verdict in favor of the Defendants.

THE COURT: All right. At this point, the Court is required to take the evidence in the light most favorable to the Plaintiff.

In doing that, the motion is denied.

We will be in recess until 9:00 a.m.

(Court adjourned until the following morning at 9:00 a.m.)

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

Case Number: EC87-262-B

MARY ANN FYFE

v.

JOHN CURLEE, *et al.*

VERDICT

[Filed April 26, 1989]

WE, THE JURY, FIND: for the defendants, JOHN CURLEE and THE ABERDEEN MUNICIPAL SEPARATE SCHOOL DISTRICT.

/s/ Faye C. Wiggers
Foreperson's Signature

April 25, 1989

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

Case Number: EC87-262-B

MARY ANN FYFE

v.

JOHN CURLEE, *et al.*

JUDGMENT IN A CIVIL CASE

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED, that the plaintiff, MARY ANN FYFE, take nothing of the defendants, John Curlee and the Aberdeen Municipal School District. IT IS FURTHER ORDERED that all cost is hereby taxed to the plaintiff, MARY ANN FYFE.

Date April 25, 1989

NORMAN L. GILLESPIE
Clerk

/s/ Leroy Wadlington
(By) Deputy Clerk
LEROY WADLINGTON

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

Civil Action No. EC87-262-B-D

MARY ANN FYFE,
Plaintiff

vs.

JOHN CURLEE, and THE ABERDEEN MUNICIPAL SEPARATE SCHOOL DISTRICT,
Defendants

ORDER DENYING MOTION FOR JNOV
OR NEW TRIAL

Having considered the Motion for New Trial and Judgment Not Withstanding the Verdict filed by the Plaintiff, the Court finds the Motion is not well taken.

Accordingly, it is hereby *ORDERED* that the Motion for New Trial or Judgment Not Withstanding the Verdict be and the same is hereby denied.

SO ORDERED this the 28th day of April, 1989.

/s/ Neal Biggers
U. S. District Judge

APPENDIX H

EXCERPTS FROM TRANSCRIPT OF JURY CHARGE FROM SUPPLEMENTAL RECORD

* * * *

[7] You are instructed that states, such as the State of Mississippi, acting through their school systems, may legitimately interfere with even the constitutionally protected conduct of a public school employee whenever that conduct of the school employee interferes with the operation or effectiveness of the educational program.

If you find, by a preponderance of the evidence, that the Plaintiff's decision to send her child to the private, segregated academy materially and substantially interfered with the operation or effectiveness of the educational program at the elementary school, and that the school board's interest in maintaining an orderly, safe and educationally sound school system outweighed the Plaintiff's interest in sending her child to the private, segregated academy, then you must return a verdict in favor of the Defendants.

The first and Fourteenth Amendments to the United States Constitution protect the right of a parent to make decisions regarding the education and welfare of the parent's children.

The Court instructs the jury that this right under the United States Constitution can be taken from a parent by a school district only if the parent's choice materially and substantially interferes with the operation of the school, [8] such that the school's interest in maintaining an orderly school system outweighs the parent's interest in making educational decisions for the child.

In other words, the decision of which school a child may attend is a matter for the parent to decide and not a matter for the school district to decide. The school district may take action in retaliation for a parent's decision to send the child to a private school, only if the parent's decision causes a material and substantial inter-

ference in the operation of the school, such that the school's interest in order and effectiveness outweighs the parent's interest in choosing the child's school.

Therefore, the decision that you are to make in this case is whether Ms. Fyfe's decision actually interfered, in a material and substantial fashion, with the operation or effectiveness of the public school system.

If you find that it did not interfere with the operation and effectiveness of the public school system, then you must return a verdict for Ms. Fyfe. If you do find that her decision did actually and substantially interfere with the operation of the school system, then you must engage in a balancing test to determine whether or not Ms. Fyfe's interest in controlling the education of her child outweighed the school board's interest in an orderly and effective school.

There is a State statute. It is entitled [9] Mississippi Code Annotated, Section 37-9-59, which says—and I quote—"The School Board of every school district in this state is hereby prohibited from denying employment or re-employment to any person as superintendent, principal, or certified employee. . . or as a non-instructional personnel. . . for the single reason that any eligible child of such person does not attend the school system in which such people are employed."

You should consider this statute in determining the importance of the State's interest in the orderly operation of the school system.

If the Plaintiff proves that she has been deprived of a Constitutional right, as previously described in these instructions, she may recover actual or compensatory damages. In order to recover compensatory damages, the Plaintiff must prove by a preponderance of the evidence that she actually suffered injury or damages as a result of the deprivation of those rights. Damages are not presumed to flow from every deprivation of Constitutional rights.

You are not permitted to award damages for the intangible or abstract value of the deprivation of Consti-

tutional rights. Even if you find that the Plaintiff has been deprived of her Constitutional rights, you may award to her only the actual damages which she has proven.

Damages are not allowed as a punishment, and cannot [10] be imposed or increased to penalize the Defendants. Neither can damages be based on speculation, because it is only actual damages or what the law calls compensatory damages that are recoverable.

If you find by a preponderance of the evidence, that the Plaintiff's First Amendment rights have been violated, you may award her compensatory damages only upon proof of actual injury. Mere proof of the violation of a right will not support an award of compensatory damages.

Even in the absence of proof of a compensable injury, you may award nominal dollar damages, not to exceed one dollar, to the Plaintiff if you find, by a preponderance of the evidence, that there was an infringement of a fundamental First Amendment right.

The Court further instructs the jury that the personal preferences of the Superintendent and the School Board are not a sufficient justification for denying the Plaintiff the right to choose and direct her child's education. If, however, you find by a preponderance of the evidence that the Superintendent and the School Board were justified, and under the circumstances were reasonable, apart from their personal preference in their decision to transfer the Plaintiff to the Resource Center, then you should return a verdict in favor of the Defendants.

The Court instructs the jury further that the [11] Plaintiff was, prior to 1987, and is now a non-instructional employee-at-will of the Aberdeen School District. Under Mississippi law, an "employee-at-will" can be terminated by an employer for a good reason, a bad reason, or no reason at all. An "employee-at-will" cannot, however, be retaliated against for a reason which infringes upon Constitutionally protected interests.

A non-instructional employee is a school system employee who is not required to hold a valid teaching certificate as a prerequisite to employment. Under Mississippi law, the duties assigned to "non-instructional employees", such as the Plaintiff, are within the sole discretion of the Superintendent, or the administrative Superintendent, and that discretion is subject only to budgetary restraints, and Constitutionally protected expressions.

The fact that I have instructed you on the elements of damages that you may consider should not be interpreted by you as meaning that the Court feels that damages should or should not in any way be awarded, or that the Court has any feelings one way or another about the liability in this case.

Upon retiring to the juryroom, you should first select one of your number to act as your foreperson, who will preside over your deliberations and who will be your spokesman here in court.

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